

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

HARRY J.F. KORRELL DIRECT (206) 628-7680 harrykorrell@dwt.com 2600 CENTURY SQUARE 1501 FOURTH AVENUE SEATTLE, WA 98101-1688

TEL (206) 622-3150 FAX (206) 628-7699 www.dwt.com

May 19, 2005

The Honorable John E. Bridges Chelan County Superior Court Department No. 3 401 Washington Street Wenatchee, WA 98807

Re: Borders v. King County, et al.

Dear Judge Bridges:

I write in response to Mr. Hamilton's letter of earlier this afternoon. Contrary to WSDCC's representations in that letter, the additional information provided by Petitioners does *not* add new claims to this case. Petitioners have simply provided more information about improperly cast and counted provisional ballots already disclosed.

As indicated in Petitioners' filing yesterday, and as is plain on the face of Petitioners' April 15 disclosure, Petitioners identified in their April 15 disclosure several categories of errors and illegal votes including:

- (a) 1,156 provisional ballots improperly cast and counted, but for whom only precinct information was known (see Exhibit 8 to Bowman Declaration, filed April 15 "Precinct List of Improperly Cast and Counted Provisional Ballots in King County") and
- (b) 348 improperly cast and counted provisional ballots, for whom Petitioners provided 317 names (see Exhibit 7 to Bowman Declaration, filed April 15, "Improperly Cast and Counted Provisional Ballots").

The additional information provided yesterday simply provides more detail, not available on April 15, about these categories of illegal and invalid votes (this is information Petitioners could have simply waited to present at trial, since the errors and resulting invalid votes had already been disclosed on April 15, per the Court's order). Specifically, Petitioners provided 437 more



names of provisional ballot voters who cast their ballots directly into tabulating machines (many of whom also appear to have cast other ballots on election day).

The argument that this additional information is untimely lacks merit for several reasons: First, the Court's order specifically required the disclosure on April 15 of information regarding the claimed challenged votes only "to the extent known." Petitioners disclosed all the information that was then known, and the additional details regarding these categories (specifically additional names of people who improperly cast provisional ballots) was not made available by King County until after the April 15 deadline and after Petitioners completed their direct examination of the Director of King County Records, Elections, and Licensing.

Second, the Court's order allowed for the modification of the deadlines for good cause. While Petitioners believe this additional information does not require modification of any deadline (since the additional information merely provides more details about *previously identified* errors and invalid votes), good cause exists because of King County's failure to produce the relevant material until after April 15.

Third, the suggestion that this issue has been raised only at the last minute is simply false. Counsel for WSDCC and King County were present for the deposition of Mr. Logan on April 18 when King County finally produced, to all parties, a document containing additional information about 437 provisional ballots King County now concedes were cast directly into tabulating machines. And counsel for WSDCC and King County were present for the deposition of Colleen Kwan on May 5 when she explained the significance of the documents. Shortly after that, Petitioners sent a letter to all counsel confirming that this new information would be included in Petitioners' case. See Korrell letter, attached as Exhibit A to Korrell Declaration filed yesterday along with the disclosure under RCW 29A.68.100. The claim of unfair surprise is groundless.

Because the additional information pertains to categories and numbers of illegal and invalid ballots already disclosed on April 15 and merely provides more of the detail requested by the court's order than was available back on April 15, there is no basis for WSDCC's request to keep this category of compelling evidence from the court.

Very truly yours,

Davis Wright Tremaine LLP

Harry J.F. Korrell

HJFK:mcs

cc: All Counsel

THE HONORABLE JOHN E. BRIDGES 1 2 3 4 5 6 7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN 8 TIMOTHY BORDERS, et al., 9 No. 05-2-00027-3 Petitioners, 10 DECLARATION OF E-FILING 11 v. AND SERVICE KING COUNTY, et al. 12 Respondents. 13 and 14 WASHINGTON STATE DEMOCRATIC 15 CENTRAL COMMITTEE, 16 Intervenor-Respondent, 17 And 18 Libertarian Party of Washington State et al., 19 Intervenor-Respondents. 20 MARGARET A. SINNOTT states as follows: 21 22 1. I am over the age of 18 years and am not a party to the within cause. 2. I am employed by the law firm of Davis Wright Tremaine LLP. My 23 business and mailing addresses are 2600 Century Square, 1501 Fourth Avenue, Seattle, 24 25

Washington 98101-1688.

26

27

1			
2	Letter to Judge Bridges		
3	Certificate of Service		
4	to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal		
5	Services (E-Filing.com) which sent notification of such filing to the following persons,		
6	with this Certificate to follow:		
7 8 9 10	Kevin Hamilton, Esq. Perkins Coie LLP Attorneys for Washington State Democratic Central Committee 1201 Third Avenue, Suite 4800 Seattle, WA 98101	Thomas Ahearne For: Secretary of State Sam Reed Foster Pepper & Shefelman 1111 Third Avenue, Suite 3400 Seattle WA 98101	
11 12 13	Russell J. Speidel Speidel Law Firm 7 North Wenatchee Avenue, Suite 600 Wenatchee, WA 98807 Dale M. Foreman	Richard Shepard John S. Mills For: Libertarians Shepard Law Office, Inc. 818 S. Yakima Avenue, #200 Tacoma, WA 98405 Tim O'Neill	
15 16 17	Foreman, Arch, Dodge, Volyn & Zimmerman P.S. 124 North Wenatchee Avenue, Suite A P.O. Box 3125 Wenatchee WA 98807-3125	Klickitat County Prosecuting Attorney 205 South Columbus Ave., MS-CH18 Goldendale WA 98620	
19 20 21	Gary Riesen Chelan County Prosecuting Attorney PO Box 2596 Wenatchee WA 98807-2596	L. Michael Golden Lewis County Senior Deputy Prosecuting Attorney 345 West Main Street Chehalis WA 98532	
22 23 24	Barnett N. Kalikow, Esq. For: Klickitat County Auditor Kalikow & Gusa PLLC 1405 Harrison Avenue NW, Suite 207 Olympia WA 98502	Jeffrey T. Even, Asst. Attorney General For: Secretary of State Sam Reed Attorney General's Office PO Box 40100 Olympia WA 98504-0100	
25			

On May 19, 2005, I caused the documents listed below:

26

27

3.

1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	

27

Gorden Sivley
Michael C. Held
Snohomish County Deputy Prosecuting
Attorneys
2918 Colby Avenue, Suite 203
Everett WA 98201-4011

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of May, 2005, at Seattle, Washington.

Margaret C. Sinnott

1	T	HE HONORABLE JOHN E. BRIDGES	
2			
3			
4			
5		ALCE ON	
6	STATE OF WASHINGTON CHELAN COUNTY SUPERIOR COURT		
7	TIMOTHY BORDERS, et. al.,	NO. 05-2-00027-3	
8	Petitioners,	SECRETARY OF STATE'S	
9	V.	RESPONSE TO WASHINGTON STATE DEMOCRATIC CENTRAL	
10	KING COUNTY, et. al.,	COMMITTEE'S MOTION TO CLARIFY THAT A "CONVICTED	
11	Respondents and	FELON RECORD" ALONE IS NOT SUFFICIENT PROOF OF A	
12	WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,	FELONY CONVICTION AND TO REQUIRE BEST EVIDENCE OF A FELONY CONVICTION	
13	Intervenor-Respondent.		
14		•	
15	COMES NOW Respondent Secretary of State Sam Reed ("Secretary Reed") and		
16	responds to the Washington State Democratic Central Committee's Motion to Clarify that a		
17	"Convicted Felon Record" Alone is not Sufficient Proof of a Felony Conviction and to		
18	Require Best Evidence of a Felony Conviction ("Motion").		
19	In their Motion, Democrat Intervenors represent their belief that Petitioners anticipate		
20	offering documents known as "Convicted Felony Records," or "CFR's", as the sole proof that		
21	certain individuals were convicted of adult felonies.	Motion at 2. Secretary Reed has no	
22	independent knowledge of what Petitioners intend t	o offer as evidence in this regard, and	
23	therefore the response that follows is based on th	e facts as described by the Democrat	
24	Intervenors. Obviously if Petitioners intend to offer different or additional evidence to show		
25	that particular individuals were convicted of felonies	s, that different approach may dictate a	

different analysis.

1 | 1 | 2 | 1 | 3 | 4 | 1 | 5 | 6 | 6 | 7 | 8 | 7 | 8 | 7 | 8

9

11 12

10

13 14

15

16

1718

19

2021

22

23

24

2526

Democrat Intervenor's motion is predicated, at least in part, upon the understanding that CFR's do not contain information sufficient to prove that a particular person was convicted of a felony. Intervenor Democrats explain that, in their understanding, a CFR provides information identifying a person, information as to whether a criminal case was resolved by guilty plea or trial and the date of completion, as well as information as to the original charges filed against the person. According to Intervenor Democrats, the documents do not set forth the specific offenses for which the individual was convicted and do not state whether the person was convicted of a felony or a misdemeanor. Motion at 1-2.

The record presently before the Court is not sufficiently detailed or helpful in order to determine the nature of the records that are the subject of this Motion. Democrat Intervenors have failed to establish what these documents are, under what circumstances they are generated, and for purpose they are generated. Given this lack of context, it would be premature for this Court to rule upon the sufficiency of this evidence based upon this record. Petitioners should, instead, be permitted to lay a proper foundation for admission of this evidence, potentially including *voir dire* by other parties as to its nature and foundation. Only then will the Court be in a position to rule upon its sufficiency or admissibility.

It is true (as Democrat Intervenors discuss) that, in the context of criminal sentencing, the ordinary method approved by Washington law for proving a felony conviction is the introduction into evidence of a felony judgment and sentence. *State v. Mitchell*, 81 Wn. App. 387, 390, 914 P.2d 771 (1996) ("The best evidence of a prior conviction is a certified copy of the judgment of conviction . . . but the State may use any documents of record or transcripts of prior proceedings to establish criminal history."). The court of appeals has held that an NCIC report (or "FBI rap sheet") is insufficient, by itself, to prove a conviction. *State v. Gill*, 103 Wn. App. 435, 449, 13 P.3d 646 (2000).

It is also true, however, that the Legislature has directed county auditors to cancel the registration of a voter "upon receiving official notice of a person's conviction of a felony in

1	either state or federal court". RCW 29A.08.520. That statute does not require that the notice		
2	come in the specific form of a felony judgment and sentence, and therefore establishes that in		
3	the context of voter registration, there may be other documents that are sufficient to provide a		
4	legal basis for cancellation of a registration.		
5	Given this background, and given the absence of sufficient contextual information in		
6	Democrat Intervenor's Motion to clearly establish the nature, source, and purpose of the		
7	documents at issue, it would be premature for this Court to rule based on this record as to the		
8	admissibility or evidentiary sufficiency of the documents at issue. Accordingly, the Secretary		
9	respectfully suggests that this Court deny this Motion without prejudice. After Petitioners are		
10	afforded at trial the opportunity to establish a sufficient evidentiary foundation to support the		
11	admissibility of this evidence, the Court may consider again the question of whether these		
12	records are admissible or sufficient based upon a record that clearly shows their nature,		
13	source, and purpose.		
14	DATED this 19th day of May, 2005.		
15	ROB MCKENNA Attorney General		
16			
17	Maureen Hart, WSBA No. 7831 Solicitor General		
18	/s/		
19	Jeffrey T. Even, WSBA No. 20367		
20	Assistant Attorney General		
21	FOSTER PEPPER & SHEFELMAN PLLC Special Assistant Attorneys General		
22	Thomas F. Ahearne, WSBA No. 14844 Hugh D. Spitzer, WSBA No. 5827		
23	Marco J. Magnano, WSBA No. 1293		
24	Attorneys for Respondent Secretary		
25	of State Sam Reed		
26			
l	ı		